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FEMINIST CRITIQUES OF INTERNATIONAL COURTS SYMPOSIUM

# Why a woman's presence on the bench is a human rights issue

**SELEN KAZAN** — 27 April, 2017



In order to avoid the danger of an essentialist approach when talking about women's representation in international courts, the issue should be framed as of of human rights and not merely as one of gender. Although both approaches, the human rights and a more gender-focused feminist one, may have the same goal this is a tricky and crucial distinction to be made. When discussing arguments for women's presence on the benches of international courts, feminist critics – such as Hilary Charlesworth – have underlined the risk of essentialist approaches. Charlesworth raises the argument how justifying quotas and similar measures to bring women into positions that men hold in majority can lead to problematic argumentations about what distinguishes genders. To give my article some fundament I will focus on Charlesworth's text "Feminists Critiques of International Law and Their Critics" from 1995, tracing her discussion of gender equality as a human rights issue and asking how this applies to international courts.

The absence of women is more than a simple "statistical underrepresentation" especially in councils, commissions and courts that deal with issues that concern women, but also in general. A woman is not only "needed" when the subject matters specifically concern women or topics considered as "women-related". The objective is that one day we are not glad or surprised to see a female judge on what used to be a typical "male" court, but that her presence on the bench is completely natural. The current absence or underrepresentation of women – and its wide acceptance – show that there is still a long way to go, and that this issue is not sufficiently considered as an urgent issue. The feminist critique of human rights argues that what is considered as "universal" human rights are in practice often the rights of men, and not of women, and that gender equality, and freedom from discrimination for women remains at a low priority in the international arena.

As Charlesworth argues 'issues traditionally of concern to men are seen as general human concerns; whereas 'women's concerns' by contrast are regarded as a distinct and limited category'. Great imbalance in political participation between women and men is in itself a human rights issue. It is thus not on a woman to justify her right to equal representation, but the duty of legal regulation to work in that direction through quotas and/or aspirational targets. These measures, however, are sometimes criticizes to potentially stigmatize women as "the weak ones" who "need help" to get into a position. A further question that is raised here is whether such measures come at the cost of discriminating

the majority in order to balance out differences?

Such view goes against my argument that the issue is not one of gender in the first place, but of human rights. As Nienke Grossman mentions in the interview here, with reference also to Stephanie Hénnette-Vauchez, quotas should work as floors, not as ceilings. In my view, quotas should get adopted with "sunset provisions" meaning that once we have somehow reached equality the quota should be dismissed and the recruitment process should be liberated from the explicit gender component. To be more precise, we should think about the issue as question of equality of access rather than equality of result: the matter is to provide persons with the chances they need to access the position that others, men, already hold. Different or tailored treatment in that sense a better path to fairness of outcomes. And that is the approach we need to consider when talking about judges' recruitment.

Is a quota system, even with a sunset provision thus essentialist as it aims for equality by "positive discrimination"? Charlesworth in her article points to the problem that women might be viewed as the "helpless gender" in need of a helping hand in form of a policy enabling access to certain jobs. But viewing the question of equal representation on court benches as a human rights issue means first of all recognizing that currently access is not equal. It is in recognition of that fact that there should be a legal obligation to appoint in parity to international courts. In its initiations, a human rights would be similar to a tailored differential treatment. But in substance, such approach means not tailored treatment, but liberation, opposing current gender-biases that preference men. This is reflected in the proposals Grossmann describes in her interview, such as making appointing mechanisms more transparent as. With a successful development in that direction, the characteristics of a person don't play the primary role but their qualification and abilities in their profession.

This issue should ultimately not only concern women but also be a matter of interest for the male judges on the benches. International courts are in many respects institutions of human rights – how credible can their work be, if it does not give value to matters of proper representation on its benches? How universal can human rights be if they are interpreted without representation of half of the world's population? The failure of the international community to provide better undermines the universal character of such rights. True representation results in the authentic legitimacy of that institution and its credibility. Therefore, a just, transparent and equal appointing system should be applied to international courts.

*Selen Kazan is a political science and law student at the Westfälische-Wilhelms-Universität Münster with a special focus on international relations and international public law.*

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